IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

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| IN RE: | ) | Chapter 13 Case |
| | ) | Number 187-00932 |
| JAMES RYAN LeBLANC | ) | |
| | ) | |
| Debtor | ) | |
| | ) | |
| CREDITOR/MOVANT: WILLIAM HILL | ) | |

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The motion of William Hill (Hill) creditor to dismiss or convert to a Chapter 7 proceeding the Chapter 13 petition of James Ryan LeBlanc, debtor having been heard and parties afforded opportunity to file briefs in support of their positions, the Court makes the following

FINDINGS OF FACT

1. Debtor filed his petition under Chapter 13 of the Bankruptcy Code on September 1, 1987.

2. On November 19, 1987 Hill, a creditor, filed his motion to dismiss or convert to a Chapter 7 proceeding and subsequently on December 16, 1987 filed an amendment to the motion.

3. On January 5, 1988 the debtor filed an amendment to his Chapter 13 petition in pertinent part adding to his

statement of property and exemptions deferred salary of Sixty Five Thousand

an No/100 ($65,000.00) Dollars with a claimed market value and exemption of One Hundred and No/100 ($100.00) Dollars and claim for personal injury of Ten Thousand and No/100 ($10,000.00) Dollars with a claimed exemption of Seven Thousand Five Hundred and No/100 ($7,500.00) Dollars.

4. At the hearing on the motion the debtor testified that although there had been a substantial period of time when he did not derive any income from his employer Leblanc Corporation, since the filing of his Chapter 13 petition the debtor was drawing an annual salary of Twenty Five Thousand and No/100 ($25,000.00) Dollars at a rate of Four Hundred Eighty Seven and No/100 ($487.00) Dollars per week. Regarding his personal injury claim the debtor testified that the injury was pre-petitioned but the settlement in the amount of Thirty Thousand and No/100 ($30,000.00) Dollars occurred post-petition and following the payment of attorneys fees the debtor and his wife received the sum of Ten Thousand Seven Hundred Thirty Six and 88/100 ($10,736.88) Dollars each in settlement of their claims. Prior to the debtor's testimony this settlement had not been reported to the Court. The debtor testified that he owns one hundred fifty five (155) shares of Leblanc Corporation equaling a Thirty One percent

(31%) ownership in the company and further testified that as of September 1, 1987 the assets of corporation consisting primarily of patent rights was Three Million and No/100 ($3,000,000.00) Dollars and the corporation had outstanding

obligations of One Hundred Fifty Thousand and No/100 ($150,000.00) Dollars. The shares of stock are unencumbered. The debtor's stock ownership interest in LeBlanc Corporation was not disclosed in his petition. The debtor failed to disclose in his petition that he had guaranteed a One Hundred Thousand and No/100 ($100,000.00) Dollar note obligation of LeBlanc Corporation three (3) days prior to filing, but testified that he did not believe he owed the money as a guarantor.

CONCLUSIONS OF LAW

In support of his motion, Hill has argued that the debtor is ineligible for Chapter 13 relief because the debtor is not an individual with regular income and because the debtor's unsecured liability exceeds the limits for Chapter 13 eligibility.

The standards for conversion of a Chapter 13 case are set out in §1307 of the Bankruptcy Code. Section 1307(c) provides that the Court may dismiss or convert a Chapter 13 case for "cause" without the consent of the debtor. The section envisions that conversion or dismissal will be considered in the light of what is best for creditors and sets out a non-exclusive

list of factors which constitute cause for conversion. In this case, Hill maintains that the debtor's case should be converted because the debtor is ineligible for relief under Chapter 13. Failure to meet the eligibility requirements for 13 relief is not one of the specifically enumerated "causes" for conversion or

dismissal however, it has been held that dismissal is in order when the debtor fails to meet the eligibility standards for Chapter 13 relief. In Re: Kelsey, 6 B.R. 114 (Bankr. W.D. Tex. 1980). By reasonable logical extension, ineligibility for relief under 13 should also be deemed good "cause" for conversion.

Section 109(e) sets forth the Chapter 13 eligibility requirements. That section provides in general that Chapter 13 relief shall be available only "to an individual with regular income that owes on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated secured debts of less than $350,000 . . . ." 11 U.S.C. §109(e). Hill asserts two particular instances where LeBlanc's petition fails to comply with this requirement: first, LeBlanc does not have a regular income; and second, LeBlanc has too much unsecured debt.

Initially, Hill argues that LeBlanc's employment situation is too speculative for him to be considered to have

regular income. From the hearing testimony, it appears that the debtor's sole employment is with a closely-held corporation, the LeBlanc Corporation in which he holds a substantial stock interest. The debtor's Chapter 13 statement indicates that the debtor was to begin drawing an annual salary of Twenty Five Thousand and No/100 ($25,000.00) Dollars from the LeBlanc Corporation, beginning October 1, 1987. In the spirit of entrepreneurial self-sacrifice, the debtor evidently had foregone

drawing any salary prior to the filing of the petition. His amended petition shows that the LeBlanc Corporation owed him Sixty Five Thousand and No/100 ($65,000.00) in deferred salary at the time of the petition. The testimony indicated that he had in fact been drawing his salary since the petition.

Hill seizes upon the fact that LeBlanc's regular salary began post-petition to support the proposition that his income is unstable and, therefore, irregular. Beyond any doubt, the financial and business difficulties experienced by the LeBlanc Corporation have precipitated the pending Chapter 13 plan of the debtor. Nonetheless, there has been an insufficient showing that the debtor as an individual cannot reasonably expect to receive his salary from the LeBlanc Corporation on a regular basis to warrant a finding that he is not an individual with regular income.

The policy rationale behind the Bankruptcy Code's requirement that a Chapter 13 debtor have a regular source of income is that to be successful a Chapter 13 plan must be funded sufficiently. In Re: Campbell, 38 B.R. 193 (Bankr. E.D. N.Y. 1984) Juxtaposed against this policy concern is the pervasive spirit of the Bankruptcy Code's rehabilitative provisions that the relief needed to give debtors a fresh start should be freely given where possible. As a result, the "regular income" requirement for Chapter 13 relief has consistently been given a flexible meaning. Courts have rejected the notions that "regular

income" means full-time employment, See, e g. In Re: Moore, 17 B.R. 557 (Bankr. M.D. Fla. 1982) (held that social security benefits were "regular income" within the meaning of the statute), or that "regular income" means a salary without periodic fluctuations, See, e.g. Margraf v. Oliver, 28 B.R. 420 (Bankr. S.D. Ohio 1983) (self-employed debtor had "regular income" even though his receipts varied and were subject to seasonal fluctuation).

The debtor has the initial burden of showing that he has a regular and stable income. Matter of Anderson, 21 B.R. 443 (Bankr. N.D. Ga. 1981). In this case the debtor testified that his salary was Four Hundred Eighty Seven and No/100 ($487.00) Dollars per week and that he had received and continues to receive

this salary. This testimony went uncontroverted.

Hill nevertheless takes the position that the income is unstable. In substance, the basis of Hill's attack is that the debtor's employer, the LeBlanc Corporation, is itself in straitened financial-circumstances. As a practical matter, a court's inquiry into the existence of a regular income on the part of the debtor cannot ignore the possibility that the debtor shortly may be without income. In Re: Tucker, 37 B.R. 257 (Bankr. W.D. Okla. 1983). There was no showing, however, that the LeBlanc Corporation would be compelled to curtail the debtor's salary in the future as opposed to making economies in other areas of management. Indeed, some of the testimony

indicated that the LeBlanc Corporation's prospects could improve significantly in the coming months through the manufacturing and marketing of various medical instruments. In the face of this and the debtor's showing that he was earning Four Hundred Eighty Seven and No/100 ($487.00) Dollars per week, the debtor cannot be said to be ineligible for Chapter 13 relief on the basis of failing to have a regular income.

As second ground for his position that the debtor fails to meet the eligibility requirements of §109(e), Hill argues ~hat the debtor's noncontingent, liquidated, unsecured liability exceeds the One Hundred Thousand and No/100 ($100,000.00) Dollar

limit. The debtor's Chapter 13 Statement lists a total of Twenty One Thousand Three Hundred and No/100 ($21,300.00) Dollars in unsecured debts. Three (3) days before filing his petition, however, the debtor signed as guarantor a promissory note executed by the LeBlanc Corporation which had a principle of One Hundred Thousand and No/100 ($100,000.00) Dollars. If this guaranty can be viewed as a noncontingent, liquidated, unsecured debt, then the debtor is ineligible for Chapter 13 relief.

The crux of the matter is the issue of contingency. A contingent debt is one that requires the debtor to pay only upon the occurrence of an extrinsic event which will trigger the liability of the debtor. In Re: All Medial Properties, Inc., 5 B.R. 126 (Bankr. S.D. Tex. 1980), aff'd per curiam 646 F.2d. 193 (5th Cir. 1981). The All Media court discussed what it termed

"the classic contingent liability of a guarantor of a promissory note executed by a third party." Id. 133. In such a situation both the creditor and guarantor know that the guarantor's liability on the note arises only if the principal maker defaults, and until such default, there is no obligation to pay the creditor. The debtor will be liable on his guaranty only if the LeBlanc Corporation fails to pay the unnamed creditor. According to the terms of the note, the LeBlanc Corporation's first payment is not due until July 27, 1988. At the earliest, the debtor individually

will become liable on this note on July 28, 1988, nearly a year after the petition was filed. Since the calculation of unsecured debts for §109(e) eligibility purposes is made at the date of the filing of the petition, the One Hundred Thousand and No/100 ($100,000.00) Dollar note guaranty is irrelevant to the consideration of whether the case should be converted for lack of eligibility under Chapter 13.

This is not to say, however, that the One Hundred Thousand and No/100 ($100,000.00) Dollar note is altogether irrelevant to the question of conversion or dismissal because there conceivably is cause shown, notwithstanding the debtor's eligibility under §109(e). The note as of this writing has still not been disclosed on the debtor's schedules as a contingent, unsecured debt. The debtor himself expressed his belief that he did not "owe" this and consequently did not consider it necessary to list the liability. Only through the probing of Hill's

attorney did this guaranty come to the Court's attention. Additionally, the debtor has expressed a willingness and readiness to guarantee additional indebtedness of the LeBlanc Corporation, with or without the Court's approval. The testimony at the hearing also revealed that on October 14, 1987 the debtor, without the Court's awareness or authorization, had compromised and settled a personal injury claim which arose prior to the filing. That claim

was property of the estate by operation of §541 of the Bankruptcy Code, but the debtor revealed it as an asset of the estate only on January 5, 1988 in his amended petition. All in all, the debtor has been forthcoming with this information only at the insistence of the creditors' attorneys.

Although debtor's execution of a One Hundred Thousand and No/100 ($100,000.00) Dollar guaranty of his employer's debt is not a factor in considering eligibility under section 109(e) his failure to disclose the transaction as well as failure to disclose at the time of filing his then unliquidated personal injury claim later settled for gross amount of Thirty Thousand and No/100 ($30,000.00) Dollars without Court approval and his failure to disclose his Thirty One percent (31%) stock ownership in the LeBlanc Corporation, his employer, are clear violations of the requirements of 11 U.S.C. 521(1) requiring the debtor to file ". . . a schedule of assets and liabilities . . . and a statement of the debtor's financial affairs." In view of these facts the debtor could not meet the good faith filing requirements for confirmation under 11 U.S.C. §1325(a)(3). (See In Re: Kitchens, 702 F.2d 885 (11th Cir. 1983).

Taken in one sense, the debtor has been evasive and lacked candor through his Chapter 13. At best, he has been careless in fulfilling his obligations under Title 11; at worst,

he has played fast and loose with the bankruptcy process to the detriment of his creditors. Some courts have held that there is cause to convert Chapter 13 case to Chapter 7 where the debtor abuses the bankruptcy process. The court in In Re: Kertennis, 13 B.R. 349 (Bankr. R.I. 1981), converted the debtor's case where the debtor had undermined any credibility she had by her repeated failure to be completely honest with respect to her income and disbursements. In a similar vein, the court in In Re: Carson, 32 B.R. 733 (W.D. Pa. 1983), converted the case of a debtor who had used Chapter 13 solely as a foil to foreclosing creditors during the pendency of her state court divorce action.

Conversion in this case would be appropriate to guard the interest of creditors. A chapter 7 trustee could probe the debtor's finances to see whether additional assets remain undisclosed, to see whether the debtor has additional liabilities, and to investigate the circumstances surrounding the personal injury settlement. The debtor has been willing to reveal these matters only when prodded by the creditors' attorneys, and a Chapter 7 Trustee would be in a better position

to determine whether the inquiry was complete. The facts of this case demonstrate sufficient cause for conversion to a Chapter 7 proceeding.

SO ORDERED at Augusta, Georgia this ___ day of

February, 1988.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE